

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Toll Free Access Codes)	CC Docket No. 95-155
)	
Database Services Management, Inc.)	NSD File Nos. L-99-87
and Beehive Telephone Company, Inc.)	and L-99-88
Petitions for Declaratory Rulings)	

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Beehive Telephone Company, Inc. (“Beehive”) challenges the Commission’s astonishing determinations that Database Service Management, Inc. (“DSMI”) qualifies as an impartial numbering administrator under 47 U.S.C. § 251(e)(1), and that the costs of toll free numbering administration do not have to be borne by all telecommunications carriers despite the explicit mandate of 47 U.S.C. § 251(e)(2). Beehive bases its challenge in large part on facts discovered recently in its litigation with DSMI in federal district court in Utah.

New evidence shows the Bell Operating Companies (“BOCs”) collectively to be the toll free numbering administrator, just as they claimed to be. The BOCs own and control the entire toll free number administrative system. Toll free numbers are administered under the BOCs’ 800 Service Management System (SMS/800) Functions Tariff (“SMT Tariff”), and through the operation of that tariff, the BOCs exercise de jure control over toll free number administration in this country. Paid over \$80 million under the tariff to administer toll free numbers, the BOCs necessarily must be the actual toll free numbering administrator.

The BOCs control DSMI through the SMS Management Team (“SMT”), which is comprised of a representative of each BOC. DSMI’s numbering administrative activities are performed under the terms of its contract with the SMT. Copies of notes of SMT meetings and conference calls obtained by Beehive conclusively show that the SMT directs the management and policies of DSMI. By virtue of the SMS Tariff, the DSMI/SMT contract, and the SMT itself, the BOCs control DSMI as prohibited by the Commission’s neutrality requirements.

According to the Commission, the SMS Tariff ensures that DSMI performs its duties “without discrimination.” However, the facts show that DSMI discriminated unlawfully by refusing

to provide 800-629 numbers to Beehive as required by the district court's injunction. DSMI departed from the SMS Tariff, and its treatment of all other RespOrgs (including the BOCs), to demand that Beehive request toll free numbers using a form requiring it to (1) identify its customer, (2) describe the type of service requested, (3) give the reasons why it is necessary to provide the service through a 800-629 number, and (4) *certify* that the identified customer requested the service as described and for the reasons given. And when Beehive capitulated and supplied the information, DSMI did not make any toll free numbers available.

DSMI's President, Michael J. Wade, testified that only Beehive has been required to submit a written application for a toll free number and pass a threshold test by showing that the use of the number is "necessary." Given ample opportunity to articulate a rational justification for DSMI's disparate treatment of Beehive in the provisioning of toll free numbers, Mr. Wade could not come up with a single plausible reason why DSMI demanded specific customer information (that was privileged under the SMT Tariff) from Beehive as a prerequisite to obtaining an 800-629 number. By disadvantaging Beehive for no reason, DSMI engaged in an unreasonable discrimination.

The Commission persists in allowing the administration of toll free numbers (a public resource) to be offered as a monopoly service by the BOCs. Not only was numbering administration to be fair and impartial, but it was to be free from the "appearance of bias" associated with entities that historically have been closely associated with LECs. Yet, the power to allocate the costs of toll free numbering administration is in the hands of the nation's four largest ILECs by virtue of the SMS Tariff. The appearance of bias in that arrangement is palpable.

As long as the administrative costs of operating the SMS/800 system are allocated by the BOCs on a for-profit basis, the administration of toll free numbers will not be impartial. An

administrator with a substantial pecuniary interest in the outcome of numbering administration cannot be deemed or perceived to be impartial. Moreover, the allocation of administrative costs among competitors by an administrator with a financial interest in the outcome of the allocation cannot be deemed or perceived to be “competitively neutral.”

When it departs from preexisting policies and governing precedents, the Commission must explain the reasons for its departure with “forthrightness and clarity.” Such an explanation is due here, because the Commission inexplicably walked away from the explicit language of § 251(e)(2) and an impressive line of controlling precedent. For example, just four months before upholding the SMS Tariff, the Commission reconfirmed that § 251(e)(2) dictates that the costs to operate a database for number administration be shared by all telecommunications carriers, not recovered through per-number charges to entities that use the database. If there is a rational explanation for treating the industry costs of toll free numbering administration differently, the Commission should share it with the public, the parties to this proceeding, and the Utah district court.

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PETITION FOR RECONSIDERATION

Beehive Telephone Company, Inc. (“Beehive”), by its attorney, and pursuant to § 405(a) of the Communications Act of 1934, as amended (“Act”), and § 1.429(a) of the Commission’s Rules (“Rules”), hereby petitions the Commission to reconsider its Fifth Report and Order in CC Docket No. 95-155 and its Orders in NSD File Nos. L-99-87 and L-99-88. *See Toll Free Service Access Codes*, FCC 00-237 (July 5, 2000) (“*Order*”). In support thereof, the following is submitted:

STANDING

Beehive filed comments in response to the summary recommendation of the North American Numbering Council (“NANC”) that Database Service Management, Inc. (“DSMI”) continue as the toll free number database administrator.¹ Beehive also initiated and participated in the Commission’s declaratory ruling proceedings in NSD File Nos. L-99-87 and L-99-88.² By its

¹ See Reply Comments of Beehive Tel. Co., Inc., CC Docket No. 95-155 and NSD File No. L-98-85 (July 13, 1998).

² See Petition for Declaratory Ruling, NSD File No. L-99-88 (Jan. 29, 1999) (“Petition”); Motion to Strike and Response to Request for Expedited Action, NSD File No. L-99-87 (Mar. 1, 1999) (“Motion”); Reply Comments of Beehive Tel. Co., Inc., NSD File Nos. L-99-87 & L-99-88 (Dec. 16, 1999) (“Reply”).

Order, the Commission denied the relief Beehive sought in both Docket 95-115 and in the declaratory ruling proceedings. And the Commission's decision to permit the 800 Service Management System (SMS/800) Functions Tariff ("SMS Tariff") to remain in effect will cause Beehive to pay 20 times more for numbering administration than if the Commission invalidated the SMS Tariff and implemented § 251(e) of the Act.³ Consequently, Beehive has statutory standing to seek reconsideration of the *Order*. See 47 U.S.C. § 405(a).

Beehive relies on facts not previously presented to the Commission. Those facts were obtained by Beehive recently in discovery in its litigation with DSMI in federal district court in Utah.⁴ New evidence was gained during the deposition of DSMI's President, Michael J. Wade, on June 20, 2000, and from documents produced by DSMI on June 30, 2000. Consideration of Beehive's new evidence is appropriate, because the evidence only became available to Beehive long after the pleading cycles ended in these proceedings. See 47 C.F.R. § 1.429(b)(2).

ARGUMENT

I. New Evidence Proves That The BOCs Jointly Are The Toll Free Number Administrator

DSMI is a straw man as far as toll free number administration is concerned. The BOCs jointly, not DSMI, serve as the toll free number administrator.

³ Beehive estimated that its contribution to support number administration (including toll free numbers) for the period March 2000 to June 2001 would be \$159 if toll free numbers were administered in accordance with Subpart 52B of the Rules. Under the current regime, Beehive will pay the Bell Operating Companies ("BOCs") \$3,266 for the administration of toll free numbers and \$25 for the administration of all other numbers. See Brief for Petitioner at 22, *Beehive Tel Co., Inc. v. FCC*, No. 99-1328 (D.C. Cir. Oct. 28, 1999).

⁴ See *Database Serv. Management, Inc. v. Beehive Tel. Co., Inc.*, Civil No. 2:96 CV 0188K (C.D. Utah filed Mar. 1, 1996).

Bell Atlantic (now Verizon Communications), BellSouth Telecommunications, Inc., SBC Communications, and U S West (now Qwest) claimed in these proceedings that they, not DSMI, “administer” the SMS/800 system and “provide” SMS/800 service.^{5/} Those claims are nowhere mentioned in the *Order*. But they are unmistakably true.

A. The SMS Tariff Makes The BOCs
 The Toll Free Number Administrator

The Commission now recognizes that the interests of the BOCs in toll free number administration are “sufficiently aligned that they may be deemed collectively to be a telecommunications provider.” *Order*, at 10.^{6/} Nevertheless, the BOCs remain a “discrete industry segment” and clearly do not qualify as an impartial administrator under § 251(e)(1) of the Act or § 52.12(a)(1) of the Rules. *Toll Free Service Access Codes*, 12 FCC Rcd 11162, 11224 (1997).

The Commission calls DSMI “the entity that administers the toll free numbering system pursuant to the SMS Tariff.” *Order*, at 8. It also recognizes that DSMI “exercises no discretion” under the tariff. *Id.* at 11. On tariff matters, DSMI simply does what the representatives of the BOCs on the SMS Management Team (“SMT”) tell it to do. *See Wade Dep. Tr.* at 72-73.^{7/}

According to Mr. Wade, DSMI acts as the agent for the BOCs.^{8/} Moreover, the Commission seems to recognize that DSMI functions under the SMS Tariff as the agent of the BOCs. *See Order*, at 15-16. *See also Beehive Tel. Co., Inc. v. The BOCs*, 10 FCC Rcd 10562, 10568 (1995),

^{5/} Comments of the BOCs, NSD File Nos. 99-87 & 99-88. at 5 (Dec. 2, 1999).

^{6/} Because they are deemed to be a single telecommunications provider, Beehive will sometimes refer to the BOCs collectively as the toll free number administrator.

^{7/} The transcript of Mr. Wade’s deposition is provided as Attachment 1 *infra*.

^{8/} *See* Letter of Michael J. Wade to N. M. Grove, at 1 (Mar. 4, 1999) (Attach. 2 hereto).

reaffirmed, 12 FCC Rcd 17930 (1997). If DSMI is the agent, then the BOCs is the entity that administers the toll free numbering system. That is certainly the way the BOCs hold themselves out in the SMS Tariff.^{9/} And since the SMS Tariff constitutes the law, *e.g.*, *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993), the BOCs have *de jure* control over the entire SMS/800 system. Hence, by operation of law, the BOCs must be the toll free number administrator.

The Commission is asked to explain how the BOCs can be paid more than \$80 million in SMS Tariff charges to perform toll free number administration and not be the toll free number administrator. Moreover, the Commission should explain how DSMI can administer toll free numbers in accordance with the terms of the BOCs' SMS Tariff, as well as the terms of the so-called "DSMI Business Representative contract with the SMT,"^{10/} and still be "insulated from undue influence by the BOCs." *Order*, at 11.

B. The BOCs Exercise The Power To Direct
 The Management And Policies Of DSMI

Under "criteria one" of the Commission's neutrality rule, "A person *shall* be deemed to control another if such person possesses, directly or indirectly . . . [t]he power to direct or cause the direction of the management and policies of such other person . . . by contract (including but not limited to shareholder agreement . . . operating agreement), or otherwise." 47 C.F.R. § 52.12(a)(1)(i)(C) (emphasis added). Under that criteria, the Commission must deem DSMI to be controlled by the BOCs, and therefore affiliated with the BOCs. *See id.* § 52.12(a)(1)(i).

The Commission acknowledged the BOCs own and control the entire "toll free number

^{9/} See Reply, *supra* note 2, at 8.

^{10/} Letter of Michael J. Wade to Karen N. Mulberry, at 5 (Dec. 10, 1997) (Attach. 3 hereto).

administration system.” *Order*, at 12. It also found that: (1) the BOCs filed the SMS Tariff which governs the administration of toll free numbers, *see id.* at 10-11; (2) representatives of the BOCs comprise the SMT, which is “responsible for coordination of SMS/800 services,” *id.* at 3; (3) DSMI is under contract with the SMT and serves as the “business representative” of the BOCs, *id.*; and (4) under that contract DSMI is responsible for the “day-to-day management and oversight of SMS/800 services.” *Id.* at 10. Those findings suggest that the BOCs control the SMS/800 system, just like they did in 1993. *See Provision of Access for 800 Service*, 8 FCC Rcd 1423, 1427 (1993).

Prior to the sale of Bellcore (now Telcordia) to Science Applications International Corporation (“SAIC”) in November 1997, the SMT unquestionably controlled DSMI. While it claimed to make day-to-day decisions involving the SMS/800 database, DSMI was required under its contract with the BOCs to consult with the SMT “on all issues falling outside of standard operations.”^{11/} That practice continued after the Bellcore sale, when a contract between DSMI and the BOCs (or the SMT) went into effect. *See Wade Dep. Tr.* at 50.

According to Mr. Wade, who took part in the contract negotiations, DSMI (with its five or six employees) is paid in excess of \$1 million a year under a contract with the BOCs. *See id.* at 30, 49, 52. Mr. Wade testified that the SMT manages SMS/800 access service, as well as the BOCs’ contract with DSMI. *See id.* at 70-71. DSMI serves as the SMT’s business representative, and it performs ministerial functions for the SMT. *See Wade Dep. Tr.* at 122, 126, 129. For example, Mr. Wade drafts correspondence sent out on SMT stationery, prepares the agenda for SMT meetings, takes notes during those meetings, and even types the minutes. *See id.* at 174, 207-10, 235.

^{11/} Letter of Paul Walters et al. to William F. Caton, File No. E-94-57, at 2 (Apr. 20, 1995).

Beehive has obtained evidence showing that the SMT directs the management and policies of DSMI. Mr. Wade testified that the SMT meets in person every six weeks or so, and confers by telephone every two or three weeks. *See id.* at 129. Notes of SMT meetings and conference calls held after SAIC acquired control over DSMI reveal that the SMT makes policy decisions for DSMI.^{12/} For example, at its meeting in New York City on March 9-10, 2000, the SMT had an “in depth discussion” of the team’s strategic plans for dealing with SMS/800 issues. During the discussion the SMT members reported that the BOCs “remained committed to maintaining their current role” in the provision of SMS/800 services. The SMT reached agreements on several “action items,” which would be implemented by various DSMI employees (Mr. Wade, Anil Patel, Erik Chuss, and Joseph Casey).^{13/} Thus, the notes of the New York meeting demonstrate that DSMI is relegated to carrying out policy decisions made by the SMT.

With respect to strategic planning, the SMT directed Mr. Wade to make changes in an “Action Plan for Addressing Industry Concerns.”^{14/} The SMT decided to take steps to build stronger relationships with small and medium-sized RespOrgs, and to work on “contentious issues” on a case-by-case basis with small groups.^{15/} To counteract “performance concerns,” the SMT agreed to work with a SMS/800 Performance Improvements Team to define acceptable solutions. It decided to release a “high-level summary” of a user survey apparently conducted by the Taylor Group. The

^{12/} Copies of the notes of the SMT meetings and conference calls (some of which have been redacted by DSMI) are attached collectively as Attachment 4.

^{13/} *See* SMT Mar. 9-10, 2000 Meeting Notes, at 1-2 (DSMI 000252).

^{14/} *See id.* at 1.

^{15/} *See id.* at 2.

SMT also adopted a “public relations approach” in which “[p]ositive information regarding SMS/800 services will be disseminated as often as possible,” while “[a]ny potentially negative situations will be contained as effectively as possible.”^{16/}

At the same meeting, the SMT agreed to work to develop an “ongoing relationship” with the Commission staff, and it decided that the initial contact with the staff would be to address the definition of “number administration” and how it is handled for toll free numbers. The SMT decided to review its options with respect to the Commission’s “possible reactions to current industry activities,” and to prepare for another meeting to be held after an “ex parte visit” to the Commission scheduled for March 15, 2000.^{17/}

In addition to making strategic plans, the SMT made routine management and operations decisions. At the New York meeting, the SMT approved a \$14,000 second quarter incentive award to the SMS/800 Help Desk. The SMT also authorized “moving MGI testing to Dallas” as long as SCP testing is not “impacted.”^{18/}

The evidence clearly shows that the SMT exercises plenary decision-making authority with respect to DSMI’s involvement with the SMS/800 system. The SMT manages both the tariffed SMS/800 access services and the contract under which DSMI operates. *See* Wade Dep. Tr. at 70-71. It negotiates the contracts with the SMS/800 vendors, including SBC Communications, Telcordia, and Skyes Enterprises.^{19/} It maintains its own bank account, receives the monies generated by

^{16/} SMT Mar. 9-10, 2000 Meeting Notes, at 2.

^{17/} *See id.*

^{18/} *Id.* at 5.

^{19/} *See* SMT Feb. 3, 1999 Conference Call Notes, at 1 (DSMI 000232).

SMS/800 operations (the SMS Tariff charges and payments under contracts with SCP owners), signs the checks to pay vendors, and distributes profits evenly among the BOCs. *See* Wade Dep. Tr. at 127-30, 133, 177, 180-81, 183. In addition, the SMT makes decisions with respect to the budget,^{20/} accounting matters,^{21/} tax issues,^{22/} advertising,^{23/} litigation with Beehive,^{24/} and ex parte contacts with the Commission.^{25/} Furthermore, the SMT decides whether to follow industry guidelines adopted through the Alliance for Telecommunications Solutions. *See* Wade Dep. Tr. at 287-88.

The evidence shows that the BOCs are still the “real parties in interest” with respect to the SMS/800 system and they still “control all fundamental aspects” of SMS/800 access. *Beehive*, 10 FCC Rcd at 10568. The SMT makes all the decisions and, as Mr. Wade conceded, DSMI functions as the SMT’s staff. *See* Wade Dep. Tr. 126. By virtue of the SMS Tariff, the DSMI contract, and the SMT, the BOCs control DSMI within the meaning of § 52.12(a)(1)(i)(C) of the Rules.

C. The SMT And Ultimately The BOCs
Exercise De Facto Control Over DSMI

The Commission traditionally employs the six-prong *Intermountain Microwave*^{26/} test to

^{20/} *See* SMT Nov. 3, 1999 Conference Call Notes, at 1-2 (DSMI 000241-42).

^{21/} *See id.* at 2; SMT Jan. 6, 2000 Conference Call Notes, at 1 (DSMI 000247).

^{22/} *See* SMT Jan. 21-22, 1999 Meeting Notes, at 7 (DSMI 000228).

^{23/} *See id.* at 6; SMT Feb. 3, 1999 Conference Call Notes, at 2; SMT Mar. 3, 1999 Conference Call Notes, at 1 (DSMI 000236).

^{24/} *See* SMT Jan. 21-22, 1999 Meeting Notes, at 9; SMT Nov. 3, 1999 Conference Call Notes, at 4.

^{25/} *See* SMT Jan. 6, 2000 Conference Call Notes, at 2.

^{26/} *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

determine de facto control of a company. *See, e.g., AirGate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee*, 14 FCC 11827, 11840 (WTB 1999). The *Intermountain Microwave* test examines six factors that represent the normal incidents of the control of a business: (1) use of facilities and equipment; (2) control of daily operations; (3) control of policy decisions; (4) personnel responsibility; (5) control of financial obligations; and (6) receipt of monies and profits. *See, e.g., Ellis Thompson Corp.*, 9 FCC Rcd 7138, 7140-42 (1994). At least four of these factors point to the conclusion that the BOCs, through the SMT, exercise de facto control over DSMI.

We have already examined *Intermountain Microwave* factors three, five, and six, which all reflect the dominance of the BOCs and their SMT over DSMI.²⁷ With respect to factor one, the Commission has already found that the BOCs own the SMS/800 database, *see Order*, at 3, so presumably they have unfettered access to those facilities. Certainly, the SMT uses DSMI's facilities, including its mailing address, *see Wade Dep. Tr.* at 175, which the Commission has considered an indicia of common control. *See Comark Cable Fund III v. Northwestern Ind. Tel. Co., Inc.*, 100 FCC 2d 1244, 1250-51 (1985). The fact that four of the six indicia of control reside with the BOCs is more than enough to find them in de facto control of DSMI. *See Brian L. O'Neill*, 6 FCC Rcd 2572, 2575 (1991).

When the indicia of de facto control under *Intermountain Microwave* are viewed in combination with their contractual and financial power to dominate DSMI, the BOCs emerge together as the actual administrator of toll free numbers. Hence, the Commission should have focused on the transparent partiality of the BOCs, rather than straining to see DSMI as impartial.

²⁷ The fact that SMT directs DSMI's actions in its litigation with Beehive is an indicia of control. *See LaStar Cellular Tel. Co.*, 5 FCC Rcd 3286, 3289 (1990).

II. DSMI Cannot Meet The Requirements Of Any Of The Commission's Three Neutrality Criteria

A. DSMI Is An Affiliate Of The BOCs And Derives A Majority (More Than \$1 Million A Year) Of Its Revenues From Them

Reconsideration is in order even if the Commission does not recognize the BOCs as the toll free number administrator. In view of the evidence that the BOCs control DSMI, the Commission must revisit its determination that DSMI is neither an affiliate of any telecommunications carrier, *see Order*, at 9, nor under the undue influence of parties with the vested interest in the outcome of toll free numbering administration and activities. *See id.* at 10. Based on the record as it now exists, DSMI cannot pass muster under any of the Commission's three neutrality criteria. *See id.* at 9-10.

By virtue of the SMS Tariff and its contract with the BOCs, DSMI must be deemed to be controlled by the BOCs. *See supra* pp. 3-9. That being the case, DSMI flunks criterion one because it is an affiliate of a telecommunications service provider. *See Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Indus. Servs. Bus.*, 14 FCC Rcd 19792, 19808-09 (1999) ("Lockheed Order"). And the Commission already found that DSMI does not meet the requirements of criterion two, since it derives the majority of its revenues (more than \$1 million a year) from the BOCs. *See Order*, at 10.

B. A Finding That DSMI Is Under The Undue Influence Of The BOCs Is Encompassed By The Finding That The BOCs Control DSMI

The Commission permitted DSMI to remain the toll free number administer despite its failure to satisfy criterion two, because DSMI is purportedly "insulated from undue influence by the BOCs" by the terms of the SMS Tariff. *See id.* at 11. That strange application of criterion three defies the purposes of § 251(e)(1) of the Act and turns the neutrality criteria on their head.

The Commission was mandated to designate “impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.” 47 U.S.C. § 251(e)(1). The Commission concluded that numbering administrators “shall be non-governmental entities that are impartial *and* not aligned with any particular telecommunications industry segment.” 47 C.F.R. § 52.12(a)(1) (emphasis added). The Commission’s reasoning appears in *Administration of the North Am. Numbering Plan*, 11 FCC Rcd 2588, 2613 (1995) (“*NANP Order*”):

The NANP Administrator must be fair and impartial. We believe it would be very difficult, if not impossible for a NANP Administrator closely associated with a particular segment of the telecommunications industry to be impartial. Even if a NANP Administrator aligned with a particular industry segment was impartial, there would still likely be the perception and accusations that it was not.

The intent to prevent the “perception and accusations” of partiality is reflected in the threshold requirement of § 52.12(a)(1) that the NANP Administrator (“NANPA”) must be both “impartial and not aligned” with any particular industry segment. Thus, the rule has a prophylactic effect. It prevents the perception that the NANPA is biased. Consequently, the rule cannot be read to allow a finding that the NANPA is *controlled* by a telecommunications provider under criterion two to be trumped by a finding that the entity was not subject to *undue influence* by the telecommunications provider under criterion three. Logically and perceptively, an administrator controlled by a telecommunications provider necessarily must be subject to that provider’s undue influence.

Obviously, “influence and control are not the same.” *News Int’l, PLC*, 97 FCC 2d 349, 356 (1984). An entity’s “influence” on a corporation becomes “control” when it reaches the degree that the entity is able to “determine” the corporation’s policies or “dominate” corporate affairs. *See id.*

To analogize to criminal law, influence is the “lesser included offense” to control. If the BOCs are guilty of controlling DSMI, they are guilty of the lesser offense of “undue influence.”

The difference between control and undue influence differentiates criterion three. The first two criteria are “intended to prevent the NANPA from maintaining financial or equity relationships with telecommunications service providers that could exert control over the decisions and activities of the NANPA or otherwise compromise its impartiality.” *Lockheed Order*, 14 FCC Rcd at 19808. Thus, the rule bans an entity “deemed” to be controlled by a telecommunications provider. *See* 47 C.F.R. § 52.12(a)(1)(i). In contrast, criterion three gives the Commission the “broad discretion to determine whether the entity is subject to undue influence by parties with a vested interest in the outcome of numbering administration activities.” *Lockheed Order*, 14 FCC Rcd at 19808. Hence, criterion three reaches the situation where a party (not necessarily a telecommunications provider) with a vested interest in number administration has undue influence on the administrator falling short of actual control. That less-than-controlling influence becomes “undue influence” when it can be perceived as making the administrator biased.

In this case, we are talking about a telecommunications provider, the BOCs, that the Commission found had a financial relationship with DSMI such that it could exert control over DSMI’s decisions and activities. Thus, the same financial relationship must give the BOCs undue influence over DSMI. The fact that the BOCs pay DSMI more than \$1 million a year gives rise to the reasonable perception that DSMI is biased in favor of the BOCs. The fact that the BOCs pay DSMI in excess of \$1 million for acting as their agent under their SMS Tariff does not change that perception. Moreover, it does not change the fact that the agency relationship aligns DSMI with the BOCs.

III. DSMI's Unlawful Discrimination Against Beehive Shows That The SMS Tariff Does Not "Insulate" It From The BOCs' Control

According to the Commission, the SMS Tariff and the Rules ensure both that toll free number administration is "competitively neutral" and DSMI performs its duties "without discrimination." *Order*, at 10. Those conclusions strike Beehive as exceedingly odd in light of the Commission's failure to adopt any rules to implement § 251(e) with respect to toll free numbers. Indeed, the Commission's two "neutrality" rules do not apply to toll free number administration. *See* 47 C.F.R. §§ 52.12, 52.17. Moreover, the Commission overlooked evidence that DSMI discriminated against Beehive.

Beehive charged that DSMI violated the anti-discrimination provisions of § 202(a) of the Act when it departed from the terms of the SMS Tariff to demand that Beehive request toll free numbers using a form that required Beehive to (1) identify its customer, (2) describe the type of service requested, (3) give the reasons why it is necessary to provide the service through a 800-629 number, and (4) *certify* that the identified customer requested the service as described and for the reasons given.²⁸ New evidence substantiates that charge.

Judge Jenkins issued an order on July 13, 1998 that enjoined DSMI to restore "forthwith" all the numbers (except those restored previously) in controversy to Beehive. In addition, the injunction stated that the parties "should cooperate with each other to the end that this restoration of numbers may occur as expeditiously as possible, so that the numbers may be put into service, becoming usable by . . . Beehive, as quickly as practicable."²⁹ However, when Beehive sought

²⁸ *See* Motion, *supra* note 2, at 3-4, Exhs. 1, 2.

²⁹ Petition, *supra*, note 2, Attach. 6 at 6.

DSMI's cooperation in beginning the restoration of the 800-629 numbers, Mr. Wade responded by letter (on SMT's stationery) on August 3, 1998 saying only that the "appropriate methodology to be used in assigning the disputed numbers . . . is still being litigated."³⁰

Mr. Wade claims that he cannot discuss settlement with Beehive, and that there is no provision in the SMT Tariff for settlement. *See* Wade Dep. Tr. at 320. Nevertheless, on September 11, 1998, he wrote a memorandum to the SMT members to ask if they had "objections with moving ahead" with negotiations then underway with Beehive. Mr. Wade informed the SMT that he had discussed the matter with one of DSMI's attorneys and had "one concern: We need to define the conditions under which we would ever agree to release a number for use by Beehive, or any other RespOrg."³¹

On November 24, 1998, the Tenth Circuit Court of Appeals remanded the case to the District Court for referral to the Commission, denied DSMI's motion to suspend the lower court's injunction, and directed that the injunction be narrowed.³² Accordingly, on January 20, 1999, Judge Jenkins issued an order amending the injunction to read:

... [A]ll "629" numbers of the 10,000 not currently in use by Beehive or other RespOrgs are to be placed by DSMI in "unavailable" status pending FCC resolution of the matters referred to it by the district court, provided, however, that Beehive shall be allowed to obtain a "629" number from the "unavailable" block when necessary to provide service to a new Beehive customer or additional service to an existing Beehive customer.³³

³⁰ Letter of Michael J. Wade to A.W. Brothers (Aug. 3, 1998) (Attach. 5 hereto).

³¹ Memorandum of Michael J. Wade to Charron Cox, at 1 (Sept. 11, 1998) (Attach. 6 hereto).

³² *See* Petition, *supra* note 2, Attach. 7 at 15-16.

³³ *Id.* at 4.

The amended injunction stated that the parties “should cooperate with each other to the end that such additional numbers may be put into service, becoming useable by . . . Beehive, as quickly as possible.”³⁴ Once again, Beehive was rebuffed when it attempted to obtain 800-629 numbers from DSMI. On January 26, 1999, Mr. Wade sent Beehive the “Request for Toll Free Number from the 800-629 Series” form. *See* Wade Dep. Tr. at 150. In his letter transmitting the form to Beehive, Mr. Wade recited language from the injunction and asked:

that you provide us with the information indicated on the enclosed form for each number from the 800-629 series that you are requesting. Based on that information, in accordance with the court’s order, if it appears necessary to provide service to your customer through a number from the 800-629 series, then the number will be released and assigned to Beehive.³⁵

As the Commission can plainly see, the District Court’s injunction did not empower or require DSMI to withhold the 800-629 numbers until it is satisfied, based on a written explanation from Beehive, that it is “necessary” to provide service to a Beehive customer through an 800-629 number. To the contrary, the injunction stated in mandatory terms that “Beehive *shall* be allowed to obtain a ‘629’ number from the ‘unavailable’ block when necessary” to serve a customer. Not only was DSMI directed to allow Beehive to obtain 800-629 numbers, but DSMI was at least encouraged to “cooperate” so that Beehive could put the numbers to use “as quickly as possible.” The injunction simply cannot be read to make DSMI the judge of when an 800-629 number is “necessary” to provide toll free service to a Beehive customer.

When asked to point to the part of the Tenth Circuit’s order that gave DSMI the authority

³⁴ Petition, *supra* note 2, Attach. 7 at 4 n.5.

³⁵ Letter of Machael J. Wade to Arthur Brothers (Jan. 26, 1999) (Attach. 7 hereto).

to decide when the use of an 800-629 number was necessary, Mr Wade could not do so. Attempts to get Mr. Wade to answer that question consumes the last twenty-one pages of the transcript of his deposition. *See* Wade Dep. Tr. at 321-32. Obviously, DSMI was without a legal basis to require more of Beehive than any other RespOrg.

Under the Rules, the act of reserving a toll free number from the SMS/800 database system constitutes the RespOrg's certification "that there is an identified toll free subscriber agreeing to be billed for service associated with the toll free number." 47 C.F.R. § 52.105(d). Nothing in the Rules or in the SMS Tariff authorized DSMI to require Beehive to expressly certify in writing that there is a named subscriber that needs a toll free number for a specified reason. In fact, Beehive is required by § 2.3.1 of the SMS Tariff to "[t]reat all subscriber information as confidential unless otherwise instructed by the subscriber." *See also* Wade Dep. Tr. at 278-81.

Claiming that the situation with the 800-629 numbers is "unique," Mr. Wade admitted that only Beehive has been required to submit a written application for a toll free number and pass a threshold test by showing that the use of the number is "necessary." *See id.* at 141-42, 152-57. Asked what he intended when he sent the form to Beehive, Mr. Wade thought the intent was to collect information to try to determine whether "the need met the standards that were specified by the court." *See* Wade Dep. Tr. at 161, 163, 167. Asked repeatedly what DSMI was going to do with the information, Mr. Wade stonewalled by claiming not to know because it "never got that far." *See id.* at 161, 162, 166, 168, 332.³⁶ In particular, he testified that the information was not demanded

³⁶ The deposition ended with Mr. Wade maintaining: "I can't answer the question. He's asked the question ten times before, and the answer has consistently been that we never got that far." Wade Dep. Tr. 332.

with the intent that DSMI would follow up and verify the information. *See id.* at 161-62. Less than three weeks after Mr. Wade's deposition, when Beehive finally capitulated and submitted the required forms, DSMI immediately began combing Utah state records to "verify" the existence of the customers listed on the forms.^{37/}

Recall that back in September 1998, Mr. Wade expressed his concern to the SMT that "we need to define the conditions under which we could ever agree to release a number for use by Beehive." When deposed, however, Mr. Wade could not recall having a discussion with the SMT concerning what showing of need Beehive had to make to obtain an 800-629 number. *See id.* at 165-66. Asked what Beehive had to show to get a number, Mr. Wade gave his stock "never got that far" answer. *Id.* at 168, 332. He claimed he had "no idea" who would decide whether Beehive had justified the use of a 800-629 number, and he could not remember if any decision-making process was discussed. *See id.* at 169. Questioned on what he thought Beehive would have to show, Mr. Wade testified, "I can't do that. I'm not in the position to do that." Wade Dep. Tr. at 169. Asked why, he claimed not to have had a chance to "discuss it with the people who might be involved, review it with counsel." *Id.* 170.

Having obtained no guidance from Mr. Wade, Beehive began submitting "Requests for Toll Free Number from the 800-629 Series" forms to DSMI on July 3, 2000. Needless to say, DSMI ran to the District Court for "guidance" complaining that the reason given by Beehive was "meaningless" because it was "phrased in terms of desire rather than necessity" and did not indicate

^{37/} See Request for Determinations Regarding Requests for Release of Certain Numbers, *DSMI v. Beehive*, at 3 (C.D. Utah filed Jul. 18, 2000) (copy on file with the Commission) ("Request for Ruling").

why the customer “wants or needs” an 800-629 number as opposed to other toll free numbers.^{38/}

Setting aside the fact that DSMI’s President professed to having no idea what criteria Beehive had to meet, Beehive was under no obligation under the SMS Tariff or the District Court’s injunction to disclose, for example, why its customer wants or needs an 800-629 number. And there was no reason for Beehive to show a need for an 800-629 number as opposed to any other, obviously because *only 800-629 numbers were available and could be requested under the Court’s injunction*.

Mr. Wade testified that the BOCs are RespOrgs. *See id.* at 265. He admitted that DSMI has never monitored the relationship between a BOC and its toll free service customers, or looked into whether a BOC’s customers have a business need for a toll free numbers. *See id.* at 266.

The evidence clearly reveals that the Commission’s conclusions as to DSMI’s impartiality under the SMS Tariff have no basis in fact. DSMI’s treatment of Beehive proves that it exercises “discretion or judgment in permitting or prohibiting particular RespOrgs from obtaining numbers.” *Order*, at 11. The facts show that the terms of the SMS Tariff do not prevent DSMI from determining “which RespOrg may access or manage which toll free numbers.” *Order*, at 10. And most importantly, the SMS Tariff does not prevent DSMI from discriminating between RespOrgs.

Mr. Wade was given an ample opportunity to articulate a “neutral, rational justification” for DSMI’s disparate treatment of Beehive in the provisioning of SMS/800 access. *See National Ass’n of Reg. Util. Com’rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984). He could not give a single plausible reason why DSMI demanded information from Beehive that was privileged under the tariff. According to Mr. Wade, DSMI had no idea what it was going to do with the information.

^{38/} Request for Ruling, *supra* note 37.

Needless to say, by disadvantaging Beehive for no reason, DSMI engaged in an unreasonable discrimination. *See* 47 U.S.C. § 202(a). Furthermore, by refusing Beehive's requests for 800-629 numbers, DSMI failed to furnish SMS/800 access service upon reasonable request. *See id.* § 201(a).

IV. The Commission Has Failed In Its Duty To Adopt Rules
To Implement § 251(e) With Respect To Toll Free Numbers

A. The Commission Has Not Honored Its Commitment To
Adopt Rules To Implement § 251(e) In This Rulemaking

In May of this year, the Commission advised the D.C. Circuit Court of Appeals that the issues Beehive raised were pending in the "toll free rulemaking," and that an order disposing of them would be issued in this docket during the spring of 2000.^{39/} While it denied Beehive's petition for review, the D.C. Circuit clearly expressed its agreement with Beehive's argument that the Commission had not adopted rules to implement § 251(e) with respect to toll free numbers:

We sympathize with Beehive's frustration at the FCC's slow pace in promulgating regulations relating to toll-free numbering administration. * * * Although we have agreed with the FCC that the 1996 Act did not require the agency to implement regulations by August 8, 1996, that deadline and others in the 1996 Act reflected Congress's sense of urgency when it ordered the implementation of neutral and competitive numbering administration of all types. The FCC has assured the court that it will issue an order disposing of the matters raised by Beehive during the spring of 2000. We trust it will "adhere substantially to the schedule it set for itself"^{40/}

The D.C. Circuit shared Beehive's expectation that the Commission would adopt implementing rules in this rulemaking. However, the Commission not only promulgated no rules,

^{39/} See Brief for Respondents at 21, 23, *Beehive Tel. Co., Inc. v. FCC*, No. 99-1328 (D.C. Cir. decided May 15, 2000).

^{40/} *Beehive*, D.C. Cir. No. 99-1328, at 2.

but the Common Carrier Bureau is treating the *Order* as if it was not a rulemaking document.^{41/}

Rather than finally adopting long overdue rules, the Commission shuffled off consideration of the issues to yet another ad hoc proceeding before the NANC. *See Order*, at 12-13. This marks the fifth time in five years that the Commission has solicited comments on issues relating to DSMI's administration of toll free numbers. In fact, this is the second time in this proceeding that the NANC has been asked to examine toll free number administration. *See Administration of the NANP*, 12 FCC Rcd 23040, 23094 (1997). Nothing has changed since March 1998, when the NANC recommended that DSMI stay on in light of the sale of Bellcore to SAIC. If further input from the NANC actually is needed, it could have been obtained *before* the *Order* was issued. Regardless, with the submission of Beehive's new evidence, the record is more than adequate to support the conclusion that "continued ownership and control by the BOCs over the toll free number administration system" is inconsistent with § 251(e) and the public interest. *Order*, at 12.

Beehive asks the Commission to fulfill its commitment to the D.C. Circuit to complete this rulemaking by granting reconsideration and issuing implementing rules. The only reason at this late date for additional proceedings would be if the BOCs and DSMI contest the evidence now in the record. If so, the factual dispute must be resolved on the record of an evidentiary hearing, *see* 47 C.F.R. § 1.423, not on the basis of a NANC recommendation or ex parte presentations.

B. Number Administration Under The SMS Tariff
 Cannot Comply With The Requirements Of § 251(e)

The Commission agrees with Beehive that the SMS/800 database is a UNE, access to which must be given to a requesting telecommunications carrier under the BOCs' duty under § 251(c)(3)

^{41/} See Beehive's Application for Review being filed simultaneously herewith.